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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED,

Petitioner,

vs.

WILLIAM NEIL SIMON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a creditor that claims and participates in a bankruptcy proceeding in a United States bankruptcy court is free to disregard that proceeding overseas by attempting to collect obligations legally discharged by that proceeding from foreign assets of the debtor and the bankruptcy estate.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 153 F.3d 991. The orders of the district court (Pet. App. 20a-34a) and the bankruptcy court (Pet. App. 35a) are unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 27, 1998. The petition for a writ of certiorari was filed on November 25, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 524(a) of the Bankruptcy Code, 11 U.S.C. § 524, provides in relevant part:

> (a) A discharge in a case under this title —
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. . . .

STATEMENT OF THE CASE

This case concerns a large multinational bank that was one of the creditors of an American entrepreneur who tasted both success and failure in the volatile world of multinational business. The bank participated in the personal bankruptcy of the American entrepreneur in Oakland, California, without objection or reservation, but now seeks to narrow and avoid the discharge granted by the American bankruptcy law whose assistance it sought and received.

1. Respondent William Simon ("Simon") was born, raised, and educated in the United States. His career in business took him to Hong Kong, where he founded several highly successful

clothing businesses. The businesses' success attracted credit from major international banks. They obtained two loans from petitioner, the Hongkong and Shanghai Banking Corporation Limited ("HSBC"). One for about $86 million was part of a coordinated financing from several banks[1], while the other was a smaller loan (around $24 million) from HSBC alone. In the usual way, Simon guaranteed these loans personally.[2]

HSBC is one of the largest multinational banks in the world. It does business through a number of branches and large subsidiary banks throughout the United States. It is therefore economically in much the same position vis-a-vis a United States borrower as any of the great American multinational banks.[3]

In 1992, amidst a worldwide recession, Simon's businesses failed. As the secured lenders seized their assets in Hong Kong, Simon's companies filed Chapter 11 petitions in the United States. At the same time, Simon returned to the United States and cooperated fully with the lenders, including HSBC, by

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1. The larger loan, approximately $204 million, was extended by a syndication of three banks, Chemical Bank, Bank of Boston, and HSBC.

2. *See* Appellee William Simon's Amended Brief in Support of the Order of the United States Bankruptcy Court for the Northern District of California ("Appellee's Amended Brief"), Appellee's Supplemental Excerpts of Record ("Appellee's Excerpts"), Document 6, pp. 7-9; Memorandum of Points and Authorities in Support of Motion to Dismiss ("Motion to Dismiss"), Joint Record on Appeal ("Joint Record") filed in the United States District Court for the Northern District of California, Document 4, pp. 2-4.

3. Appellee's Amended Brief, Appellee's Excerpts, Document 6, pp. 9-10; Motion to Dismiss, Joint Record, Document 4, pp. 1-2; Declaration of Elizabeth Berke-Dreyfuss in Support of Motion to Dismiss, Joint Record, Document 5, Exhibit A.

helping to operate and liquidate all of the banks' collateral. Almost two years after returning home, having no prospect of paying the millions in guarantees, he filed his personal chapter 7 bankruptcy.[4]

At no time, then or since, has there been the slightest suggestion of fraud or manipulation in Simon's affairs. Despite bank scrutiny of the case (including a deposition of respondent by petitioner), Simon's bankruptcy proceeded with no objection of any kind, jurisdictional or otherwise, and with no opposition to his discharge, which was therefore granted in due course. The discharge injunction (11 U.S.C. § 524(a)), closing twin to the initial automatic stay, went into effect. Under that provision, "[a]ll creditors whose debts [we]re discharged [by the proceeding] are enjoined from instituting or continuing any action * * * or engaging in any act to collect such debts." Pet. App. 43a. Despite the usual notice to all creditors, including HSBC, there was no suggestion that his bankruptcy should have been filed elsewhere or that the discharge injunction should have been limited in any way.

Instead of objecting during the course of the proceedings, HSBC chose to follow a curious, perhaps carefully calibrated strategy. It filed its individual claim in Simon's Chapter 7 bankruptcy for its portion of the syndicate bank loan.[5] It did not choose to file a claim for its much smaller second loan to Simon's companies. Nothing in its claim filing or any pleading before the bankruptcy court reserved HSBC's position or sought to limit its appearance in any way. In short, HSBC asserted a

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4. Appellee's Amended Brief, Appellee's Excerpts, Document 6, p. 9; Motion to Dismiss, Joint Record, Document 4, pp. 1-2.

5. *See* Proof of Claim, Declaration of Elizabeth Berke Dreyfuss in Support of Motion to Dismiss, Joint Record, Document 5, Exhibit C. HSBC filed its Proof of Claim in the approximate amount of $37 million, the balance owing on its share of the syndicate loan.

substantial claim but took no other action as the Simon bankruptcy proceeded, all the way to the discharge injunction granting Simon a fresh start.

After the other creditors had gone their way, HSBC filed a declaratory action in the bankruptcy court, asserting for the first time that it was free to ignore the discharge injunction in every part of the world outside the United States. Conceding that it is subject to United States jurisdiction, it asked the bankruptcy court for a declaration protecting it from sanctions if it pursued assets belonging to Simon outside the United States. *See* Pet. App. 4a.

Assets that HSBC might desire to seize could be either pre-bankruptcy assets or post-bankruptcy assets. HSBC has never disclaimed an intention to seize assets owned by Simon before bankruptcy, although there has never been any assertion that Simon concealed any assets from the court[6] or that Simon owns an interest in any pre-bankruptcy assets whatsoever outside the United States. If any such assets existed, HSBC now concedes that they should belong to the estate for the benefit of all creditors (rather than HSBC alone).

Aside from the possibility of seizing assets of the estate for its own benefit, the only other value to the declaration HSBC sought below would be to seize post-petition assets of Simon in other countries. For example, Simon might pay a deposit against a Mexican vacation. Then again, in connection with a new business begun after bankruptcy, he might be owed an account from a French customer who had bought from him in

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6. Indeed, the bankruptcy court noted that Simon in his schedules had been careful to list "everything but the pillow cases," because of the intense scrutiny the bank lenders had applied to his bankruptcy proceeding. Transcript of Proceedings, dated April 12, 1995, Joint Record, Document 23, p. 7, lns. 1-25. That scrutiny included a deposition by petitioner pursuant to Bankruptcy Rule 2004. *Id.*

the United States. If HSBC were exempted from the discharge injunction, HSBC could garnish such debts for its benefit. On the other hand, there has been no assertion by HSBC that it desires to pursue such assets and no factual record that such assets exist or are likely to exist.

2. The key point in the decisions below was HSBC's participation in the Simon bankruptcy in Oakland. Although the bankruptcy court dismissed HSBC's declaratory action without reference to its participation, the district court and the court of appeals rested their affirmance primarily on traditional bankruptcy doctrine, holding that HSBC could not play ducks and drakes with the United States courts by asserting a substantial claim in the bankruptcy court and then arguing that it was a foreigner who should be free of the burdens of the laws whose assistance it had sought.

a. Thus, the bankruptcy court's decision held that companies subject to general jurisdiction in the United States are bound by the discharge injunction as to any property of the debtor, pre-bankruptcy or post-bankruptcy, wherever located. Pet. App. 37a-41a.

b. The district court, by contrast, held that HSBC's decision to file a claim in the Simon bankruptcy made it bound by the court's judgment and subject to the application of the discharge injunction. In addition, as to pre-bankruptcy assets, the court held HSBC subject to the worldwide *in rem* jurisdiction asserted by section 541 of the Bankruptcy Code, which all conceded was intended to extend a United States bankruptcy estate to all property of a debtor throughout the world. Pet. App. 23a-33a.

c. The court of appeals affirmed on essentially the same grounds. That court reasoned that HSBC's participation in the

proceedings barred it from claiming immunity from the discharge injunction as to post-bankruptcy property or pre-bankruptcy property (which now would be property of the bankruptcy estate). Pet. App. 1a-16a.

Judge Hall concurred specially, agreeing about the effect of HSBC's participation in the case, but putting a narrow focus on the holding as to estate property. Pet. App. 16a-17a.

REASONS FOR DENYING THE WRIT

The petition for certiorari presents an interesting question: Does the discharge granted by an American bankruptcy court apply to overseas collection activities? Perhaps unfortunately from an intellectual perspective, that question is not adequately presented by the case before the Court. Had HSBC not asserted a $37 million claim in the bankruptcy court, it would be a different case. Had HSBC objected during the bankruptcy case to the reach of the discharge injunction (or even reserved its rights to challenge that injunction), or had it brought an involuntary bankruptcy case in Hong Kong, it might be a different case. Even absent such procedural actions, had HSBC been a Hong Kong creditor without a multi-billion dollar business in the United States, it might be a different case. Similarly, a developed record regarding the nature, location, and foreign judicial treatment of contested assets would make this a much more attractive vehicle for resolving that interesting question.

Had this case been one of those other cases, it might have presented an important question, but review at this time still would have been problematic. The problem of the international effect of a discharge has hitherto produced virtually no reported litigation in the United States, so there is little or no experience or judicial development on which this Court might draw.

Furthermore, pending model legislation adopting a regime of international coordination in cooperation with a number of other countries will erect a whole new framework for cooperation, making this a delicate time to introduce any dramatic movement in United States law in this field.

Finally, no error will be left uncorrected if review is denied. The result below would give the United States bankruptcy estate and the United States discharge the same status and protection that this Court granted in our courts to foreign discharges more than a century ago. By so doing, not only is the "fresh start" for individuals protected, but a crucial requirement for the cooperative reorganization of multinational companies is held in place.

1. Several features of this case make it particularly unsuitable for plenary review of the broad question presented by the petition.

a. The most obvious feature that limits the general significance of the decision below is HSBC's decision to file a multi-million dollar claim in the Simon bankruptcy following extensive scrutiny and discovery in the various bankruptcy proceedings in the United States.[7] It signed and filed that claim without any reservation or objection.[8] It is hornbook law that one

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7. Proof of Claim, Declaration of Elizabeth Berke Dreyfuss in Support of Motion to Dismiss, Joint Record, Document 5, Exhibit C; Reporter's Transcript of Proceedings, dated December 1, 1995, p.5, ln. 14-p. 6, ln. 17, Appellant's Excerpts of Record, Document 22.

8. For reasons best known to itself, petitioner chose not to file a claim as to its second, smaller loan. It seems to have abandoned its earlier idea that this half-in, half-out posture could somehow leave it with greater rights. On the other hand, it is not clear if HSBC is trying to take the indefensible position that the discharge renders the claimed debt unenforceable but permits enforcement of the unclaimed debt. In any event, the effect of that odd strategy presents a factbound claim that does not warrant this Court's attention.

who claims in a bankruptcy proceeding may not then evade the bankruptcy jurisdiction of the federal courts.

The most important case is *Katchen v. Landy*, 382 U.S. 323 (1966). In that case, a creditor who claimed in a bankruptcy was held to have accepted jurisdiction with regard to a lawsuit against it to recover a preference, even though such a suit would not have been cognizable in that court if the creditor had refrained from bringing its claim.

This traditional doctrine is essential to the orderly administration of a bankruptcy case and consistent with its underlying nature as a court of equity. *See Bank of Marin v. England*, 385 U.S. 99, 103 (1966). It already has been applied in the bankruptcy context with regard to the automatic stay, the statutory injunction that is the opening protective bookend to the discharge injunction that arises when a bankruptcy or reorganization is completed. *Lykes Bros. Steamship Co., Inc. v. Hanseatic Marine Service (In re Lykes Bros. Steamship Co., Inc.)*, 207 B.R. 282 (Bankr. M.D. Fla. 1997); 11 U.S.C. § 727(b)[9]; 11 U.S.C. § 1141(d)(1)[10]. Thus, the court in *Lykes Bros.* held that a foreign creditor could not assert a claim in the United States bankruptcy and then seize assets elsewhere. 207

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9. 11 U.S.C. § 727(b) provides in pertinent part,

> [E]xcept as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter. . . .

10. 11 U.S.C. § 1141(d)(1) provides in pertinent part,

> [E]xcept as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan — (A) discharges the debtor from any debt that arose before the date of such confirmation. . . .

B.R. at 285-86. The court could not countenance the creditor's attempt to drink through two straws while its fellow creditors in the United States case were left with one. *See also United States Lines, Inc. v. GAC Marine Fuels, Ltd. (In re McLean Indus., Inc.),* 68 B.R. 690 (Bankr. S.D.N.Y. 1986). (Foreign corporation submitted to the *in personam* jurisdiction of the American bankruptcy court through its minimum contacts even in the absence of the filing of a proof of claim.)

Petitioner suggests that the merits may offer a smaller, more tractable issue if the petition is granted. (Pet. 20-28). The issue proffered is whether somehow the traditional consequences of participation in a bankruptcy case do not apply if the participant plans to act outside the United States. This issue is in fact more difficult and less illuminated than the central issue on which the petition is centered: the petition cites not a single case from any court in any country addressing the relationship between a creditor's decision to participate affirmatively in a bankruptcy and the court's power to bind that creditor to the result of the proceeding. Moreover, the petition provides no persuasive rationale for a contention that the lower courts' conventional application of traditional doctrine should somehow not apply generally to a creditor's conduct where the creditor, United States or foreign, is fully subject to United States jurisdiction. Even petitioner views the overseas effectiveness of a discharge as a matter of comity. *See* Pet. 18. And petitioner's decision to participate affirmatively in this country certainly should be relevant to a comity analysis of the extent of the discharge: it is much less intrusive to bind parties that participate voluntarily than to bind those who refrain from participating or appearing in our courts.

b. A second problem with this case is that the dispute in this particular case is not sufficiently ripe to afford an appropriate background for resolving the principal question.

Not only has HSBC been coy in its half-in, half-out participation in the Simon bankruptcy, but it has been equally coy about the assets it might want to seize. As the bankruptcy court noted, Simon made a very full disclosure of assets. The discovery taken in the bankruptcy court did not give rise to even a hint that any pre-bankruptcy estate assets exist anywhere. Yet HSBC has repeatedly declined to disclaim that seizing such assets is its ultimate intention.[11] Similarly, if post-bankruptcy assets are its aim, there is also nothing in the record that indicates what or where those assets might be, to say nothing of any indication of the likelihood that the foreign court voluntarily would respect the American discharge.

And the factual setting of such an assertion would be likely to raise important questions. For example, HSBC might be asserting a right to garnish an account at a Hong Kong branch of a United States bank, an account established by Simon with

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11. HSBC would like this Court to believe that it has always stipulated that it did not intend to pursue Simon's pre-bankruptcy assets, since such assets would be property of the bankruptcy estate and subject to the jurisdiction of the bankruptcy court, wherever located. Pet. 10-11. However, the record below does not support HSBC's change of heart here. The district court aptly noted that

> HSBC never states that it will not pursue assets that are part of the bankruptcy estate. In its reply . . . HSBC does not deny this, but responds that it was . . . Simon's duty under 11 U.S.C. § 542(a) to turn over any assets that are part of the estate to the bankruptcy trustee long ago.

Order Affirming Judgment of Bankruptcy Court, p. 5, fn.1, Document 13, Appellant's Excerpts of Record; Pet. 34a. To be accurate, HSBC has only claimed that it will not seek to enforce any judgment obtained in Hong Kong in the United States *until* it obtains an order of the bankruptcy court allowing it to do so. *See* Complaint, ¶ 22, Document 1, Appellant's Excerpts (emphasis added).

post-petition earnings. Does the United States bank have a right to setoff against that account for any amounts it might have been owed pre-bankruptcy? What if the garnished account had been opened in the United States bank branch in Oakland? A host of thorny and substantial questions lurk behind the blank check that HSBC asks the United States courts to issue.

As a related point, the record discloses no efforts by HSBC to bring an involuntary bankruptcy or any other action against Simon in Hong Kong (or any other jurisdiction) either before or after Simon filed his bankruptcy or obtained his discharge. Thus, the Court has no record with which to evaluate the interaction of our laws with theirs, nor is there any foreign litigation to which our courts might (or might not) defer. Pragmatism in case-selection strongly suggests that it would be better to resolve these larger questions in the context of an actual dispute, in a specific court, over rights to a specific asset. This case, with none of the context necessary to give a full perspective to the question presented, has not reached a stage adequate to provide that perspective.[12]

c. Finally, because principles of equity and comity are so central to the exercise of the power of the United States bankruptcy court with respect to the actions of other sovereigns, *cf. Kelly v. Robinson*, 479 U.S. 36, 49 (1986), we note in passing that HSBC is a particularly poor litigant to assert the non-application of United States law. It has a multi-billion dollar business in the United States. Its business thoroughly inhabits the United States as any other country where it does business, if not more so. It has long enjoyed the rich fruits of our marketplace, just as it has made large claims in our bankruptcy

12. We do not mean to suggest that the matter is unripe in the sense that the lower courts had no jurisdiction, only that the matter has not been developed in a manner that provides an adequate context for review of the question presented.

courts. If there is a case to be made for restraint as to foreign creditors, HSBC is not the creditor to make it.

2. Where there is virtually no case law and where crucial policy questions are the current subject of international negotiation and model legislation, the time is not ripe for the Court to consider the questions this case might have presented. Even if this case offered a better factual record, this Court traditionally has waited upon the development of case law in the lower courts before undertaking a new departure.

The leading authority in the world as to the international effect of a discharge is this Court's century-old decision in the reverse case: where the United States courts were asked to recognize a foreign discharge. *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527 (1883) ["Gebhard"]. In that case, New York bondholders who had purchased in New York the bonds of a Canadian company sought to enforce their original rights in the face of an approved Canadian reorganization plan. This court held that the bondholders were bound by the Canadian reorganization.[13] *Cf. Allstate Life Insurance Co. v. Linter Group Ltd.*, 994 F.2d 996 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993).

On the other hand, there are no significant decisions (from United States *or* foreign courts) involving the effect of the United States discharge on foreign creditors or on enforcement actions by creditors, United States or foreign, outside the United States. *See* Pet. 14 (acknowledging the absence of a circuit conflict). Despite the emergence of many multinational

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13. Interestingly, a German court has recently arrived at exactly the same result in a case involving German bondholders who purchased in Frankfort the bonds of a Norwegian company that subsequently reorganized in bankruptcy in Norway. Decision of May 27, 1993, IX ZR 254/92, discussed in Christoph G. Paulus, A New German Decision on International Insolvency Law, 41 Am. J. Comp. L. 667 (1994).

bankruptcies in the United States and many other countries,[14] creditors apparently have not sought to defy judgments of discharge in individual or reorganization cases by seizing assets in countries other than those where bankruptcy cases have been brought. As a result, a decision of this Court on the underlying policy questions this case might have presented would be informed by none of the practical experience appropriate for resolution of such a sensitive political question. In the end, although petitioner tries to portray the precedents as contrary to the decision below, it cites no reported decision from any country in the world that has declined to enforce its own discharge against seizure of foreign assets by persons subject to its territorial jurisdiction.

The developing nature of international cooperation also makes this a poor time for venturing into the uncharted legal sea presented in the petition. Because of the emergence of multinational insolvency problems worldwide, there are a number of important international initiatives currently under way to provide a legal framework for administering such cases and avoiding friction among courts.[15] The progress of these

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14. Evan D. Flaschen & Brian N. Watkins, *Section 304 and Related Provisions — United States Treatment of Foreign Insolvencies*, 1996-1997 Annual Survey of Bankruptcy Law 325; Evan D. Flaschen & Brian N. Watkins, *Section 304 and Related Provisions—United States Treatment of Foreign Insolvencies*, 1995-1996 Annual Survey of Bankruptcy Law 771; Jay L. Westbrook, *Creating International Insolvency Law*, 70 Am. Bankr. L.J. 563 (1996).

15. The three most notable are the European Union Convention, *see* European Union Convention on Insolvency Proceedings, Nov. 23, 1996, 35 I.L.M. 1223, the Model Law on Cross-Border Insolvency, *see* Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, Gen. Ass., A/CN.9/422 (19 December 1997) (passed by both houses of Congress last year as part of bankruptcy legislation that failed

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initiatives may be expected to change fairly sharply the framework in which these issues are addressed. Thus, a decision by this Court at this time would be likely either to clash with those ongoing developments or to confuse them.

3. In any event, petitioner offers no sound reason for doubting the reach of the discharge as explained by the court below. Foreign enforceability of a United States bankruptcy judgment — including both the automatic stay and the discharge — is essential to United States commercial policy. Thus, for example, the power and duty of a United States court to enjoin one subject to its personal jurisdiction from undertaking action against a bankruptcy debtor in another country was recently emphasized by Chief Judge Posner in a case involving a company incorporated on the island of Nevis. *In re Rimsat, Ltd.*, 98 F.3d 956 (7th Cir. 1996) (holding that it violated the automatic stay for a creditor to attempt to obtain a receivership in Nevis following the opening of the United States bankruptcy). The Chief Judge explained:

> The efficacy of the bankruptcy proceeding depends on the court's ability to control and marshal the assets of the debtor wherever located, which in this case required that [a creditor] be prevented from exercising control over the debtor.

98 F.3d at 961-62.

Although this case presents the less usual instance of an individual's discharge from multinational business debts, any rule adopted by the Court will have its greatest impact in corporate

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to pass for other reasons) and the American Law Institute Transnational Insolvency Project (cooperation within NAFTA), American Law Institute, International Statement of United States Bankruptcy Law (Tentative Draft, April 15, 1997) (final approval, May, 1997) (pending translation).

reorganization. The Chapter 11 discharge assures investors and financiers, new executives, customers, and suppliers that a plan of reorganization represents all the obligations of the reorganized company going forward, giving the interested parties a sound basis for commitment. It assures pre-bankruptcy creditors that the deal that has been struck binds all with an interest in the company. In a modern globalizing economy, those assurances will mean little to a company of any size if they are not enforceable in world markets. If the court should attempt to determine the scope of the discharge on the record in this individual liquidation case, its decision could have grave and unforeseen consequences on chapter 11 reorganizations of multinational corporations.[16]

For creditors outside the United States, especially those without United States contacts, enforcement of the finality of an individual discharge or reorganization plan will require comity from other courts throughout the world (the same comity our courts accorded in *Gebhard*). Yet foreign courts are precluded from giving effect in their countries to the United States discharge unless we assert that effect. If the United States *concedes* that its discharge operates only to the water's edge, other courts must take us at our word and permit seizure of United States owned assets and effective termination of a United States corporate reorganization or of an individual's business. It is no exaggeration to say that such a result would be catastrophic for the management of multinational default, because it would remove any possibility of a coordinated proceeding for a multinational enterprise.

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16. Because the chapter 7 individual debtor and the multinational corporation reorganizing under chapter 11 share the same statutory injunction, 11 U.S.C. §§ 103(a), 524, any limit which the Court places on Simon's discharge also would apply to the discharges arising in reorganizations of multinational corporations.

Viewed in that light, petitioner's reliance on *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244 (1991) ["*Aramco*"] is unavailing. Despite the tone of the petition, the Ninth Circuit's decision presents none of the extraterritorial overreaching that calls the rule of *Aramco* into play. Most obviously, the decision contemplates no sanction whatsoever against any Hong Kong court or Hong Kong entity. On the contrary, as the courts below found, the order operates entirely in this country, through its effects on petitioner's substantial business operations within our borders. Also, insofar as it affects pre-bankruptcy property that is property of the bankruptcy estate, its application to assets outside the United States is expressly commanded by the words of the Bankruptcy Code, which explicitly includes in the estate all assets "wherever located." This phrase was added to the statute in 1951 for the express purpose of asserting *in rem* jurisdiction in the debtor's property throughout the world.[17] The same phrase is repeated, for the same express purpose, in 28 U.S.C. § 1334(e), conferring "exclusive jurisdiction" over property of the estate "wherever located" in the world.[18]

The decision below is also very different from *Aramco* because of the differences between a bankruptcy proceeding, especially a reorganization, and an employment problem. A multinational corporation can follow different employment practices in different countries. A bankruptcy judgment of discharge in a multinational world, however, must be all of a piece. In particular, a corporate reorganization cannot go forward without the prospect of

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17. Section 70(a) of the Bankruptcy Act of 1898 (11 U.S.C. § 110(a) (repealed 1978); H.R. Rep. No. 2320, 82nd Cong., 2d Sess. 15, *reprinted in*, 1952 U.S. Code Cong. & Ad. News 1976; H.R. Rep. 595, 95th Cong., 1st Sess. 367 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82 (1978), *reprinted in*, 1978 U.S. Code & Cong. Ad. News 5787.

18. Formerly 28 U.S.C. § 1334(d) and statutory successor to 28 U.S.C. § 1471(e); H.R. Rep. 686, 94th Cong., 2d Sess. 35, *reprinted in*, 1976 U.S. Code Cong. & Ad. News 539.

recognition and efficacy in every jurisdiction where the company has significant assets and operations. That recognition cannot be achieved for United States proceedings unless the United States asserts the full range of its *in rem* jurisdiction and its commercial discharge. This need for global recognition and coordination is precisely what is driving the current efforts in the European Union, UNCITRAL, and the American Law Institute.

On the other hand, to the extent that international cooperation might fail and other courts might fail to recognize the United States bankruptcy judgment, there is nothing novel in the decision below applying United States law to parties within the United States. To understand the commonplace nature of the decision below, consider the *Galadari* case. *Drexel Burnham Lambert Group, Inc. v. Galadari*, 127 B.R. 87 (S.D.N.Y. 1991). Surely there is no reason to suspect that our court's unwillingness to recognize the Dubai proceedings here in any way undermined the willingness of the Dubai liquidator to hold that its proceedings were binding in Dubai on the parties that participated in those proceedings. The decision below works in just the same way: it upholds the validity in this country of orders issued by our courts and leaves it to courts in other countries to determine (just as this Court did in *Gebhard*) the enforceability of those orders in their countries.[19]

On the other hand, the long-term commercial policy of the United States requires mutual recognition, especially in reorganization cases. For the United States to have any hope of overseas enforcement of its discharge — the same enforcement that this Court granted the Canadian discharge in *Gebhard* — it is crucial that our own courts assert the worldwide efficacy of the

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19. For that reason, the case plainly does not present the petition's second question (Pet. 16-19): there is no doubt that a Hong Kong court could refuse to enforce the discharge just as readily as the American court in *Galadari* refused to recognize the Dubai proceedings in our courts.

United States discharge by enforcing it within the United States against persons subject to American jurisdiction. Thus, if the discharge is to have any practical effect, it must be enforced against a company like HSBC that is massively engaged in business in the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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